

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HEALTHCARE SERVICES GROUP, INC.

and

CASE 10-CA-34108

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC, LOCAL 9021

Gregory Powell, Esq., for the General Counsel.
Joyce Long, Union President, for the Charging Party.
Timothy J. McCartney, Esq., for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Birmingham, Alabama, on May 16 and 17, 2005. The charge was filed by the United Steelworkers of America, AFL-CIO-CLC, Local 9021, herein the Union, on November 18, 2002.¹ On February 10, 2005, the Regional Director for Region 10 of the National Labor Relations Board, herein the Board, issued a Complaint and Notice of Hearing. The complaint alleges that on or about November 9, 2002, Healthcare Services Group, Inc., herein Respondent, issued a written warning to employee Beverly King in violation of Section 8(a)(3) and (1) of the Act. The complaint further alleges that on or about November 12, 2002, Respondent terminated Beverly King in violation of Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaint denying the alleged unfair labor practices. It is undisputed that King's discharge was also arbitrated by the Union under the grievance procedure of the collective bargaining agreement.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and Counsel for the General

¹ All dates are in 2002 unless otherwise indicated.

² The original transcript in this proceeding was incorrectly formatted by the court reporting service. While the substance of the testimony was correct in the transcript, the organization and indexing of the transcript volumes and exhibit binders did not comply with customary arrangement and indexing for unfair labor practice proceedings before the Board. At the undersigned's request, the transcript and exhibits have been correctly arranged and indexed.

Counsel, I make the following:

Findings of Fact

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I. Jurisdiction

Respondent, a Pennsylvania corporation, has been engaged in the business of providing dietary and maintenance services to nursing facilities within the state of Alabama, including a facility at Pleasant Grove, Alabama. Annually Respondent derives gross revenues in excess of \$50,000 from customers located outside the State of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

Prior to September 2002, the Pleasant Grove, Alabama, nursing care facility known as Pleasant Grove Health Care Center was operated by Beverly Health and Rehabilitation Services, Inc., herein Beverly Health. Steven Raines served as Nursing Home Administrator during the relevant period from September 2002 through November 2002. Raines left his position at the Pleasant Grove facility as well as his employment with Beverly Health in September 2003.

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For 17 years, the Union has represented employees in the classification of aid for the Dietary, Nursing, Housekeeping, and Laundry departments as well as those employees classified as maintenance associates. Joyce Long has served as union president for the entire 17 years. Beverly King, who worked in the Housekeeping Department, served as union steward and chairman of the grievance committee for the same 17 year period. She has also served on the Union's negotiating committee for 17 years.

The Union and Beverly Health were parties to a collective bargaining agreement effective from September 26, 1998 through September 21, 2001. The agreement provided for automatic renewal from year to year unless either party gave notice of a desire to modify, amend, or terminate the agreement within a specified window period. A subsequent collective bargaining agreement extended the contract to September 28, 2003.

Both the collective bargaining agreement effective until September 21, 2001 and the subsequent agreement extending the contract to 2003 contain identical language in Article 15 with respect to the Grievance Committee. Included in the language for Article 15 is the provision that the Union's Committeemen and Chairman are free to conduct their duties with the understanding that such duties will be conducted on the non-working time of the committeemen and employees and will not interfere with normal operations or conduct of business. Additionally, the agreement provides that the "Union will make every effort to give the Executive Director or other Company designee at least twenty-four (24) hours advance notice of the necessity of being off to conduct Union business." Section five of Article 15 also includes the provision: "There shall be no Union activity on Company time."

B. Respondent's Presence at the Facility

Beverly Health subcontracted its laundry and housekeeping services to Respondent in September 2002 and subcontracted its dietary services to Respondent in November 2002. At all times pertinent to this proceeding, Kevin Muscat served as Respondent's Housekeeping and Laundry Regional Manager. Scott Jackson and Scott Peace provided district management for housekeeping and laundry services. Mark Converse held the position of Dietary Account Manager and K.C. Komer was Respondent's Dietary District Manager. During the pertinent period, Lisa Settembrino served as Respondent's Account Manager for housekeeping services at the facility. Settembrino left the Pleasant Grove facility in September 2003 and left her employment with Respondent in November 2004.

Settembrino testified that when Respondent assumes services at a healthcare facility, employees are given a new hire package; requiring their completion of certain employment forms. An employment application, authorization for criminal background check, Internal Revenue Service form W-4, and a U.S. Department of Justice I-9 form are included among the requisite forms in the new hire package. Dietary District Manager Komer testified that Respondent posted a notice informing employees that they were required to complete the requisite paperwork that included the I-9 form, W-4 form, and the authorization for a background check.

C. King's Alleged Threats Prior to November 2002

Settembrino testified that prior to November 2002, King twice threatened her. She recalled that the first incident occurred on September 24 following Settembrino's admonition to an employee for failure to complete a job. King confronted Settembrino in the basement laundry area and accused Settembrino of "picking" on the employee and asserted that the employee had done nothing wrong. Settembrino attempted to explain the circumstances to King. She recalled that as King turned to leave, she stated: "They're going to find you dead in the parking lot." Settembrino made no reply and left the area. Settembrino also testified that following King's threat, there were also four occasions when the tires of her vehicle were flattened. The first time she found her tires slashed and on two subsequent occasions there were nails in her tires. The fourth incident appeared to result from someone simply letting the air out of her tires.

After King's threat, Settembrino reported the incident to Steven Raines; Beverly Health's Administrator. When he inquired if anyone else had witnessed the conversation, Settembrino explained that no one else had been present at the time of the threat. Raines told her that there would be no way to prove that the threat occurred because it would simply be Settembrino's word against King's. For approximately three to four weeks, Raines arranged for the maintenance supervisor to accompany her when she left the facility each day. Raines also suggested that she no longer park in the back of the building.

Raines testified in response to Respondent's subpoena. He recalled that Settembrino reported King's insubordination on more than one occasion. He testified that Settembrino also reported that King threatened her and that there had been damage to her vehicle. He recalled that he suggested to Settembrino that she no longer park in the back of the building. He could not recall what other action he may have recommended to Settembrino. He speculated that he may have also suggested that she report the incidents to her supervisors and the police.

Settembrino also testified that King made a threat to her at the end of the first week in October 2002. She could not, however, recall the specific details of the threat.

5 **D. The Events of November 6, 2002**

Komer recalled that on November 6, he observed four to six Dietary Department employees sitting in the resident's day room as he walked down the hall. The employees motioned for him to join them. When he joined the employees, Dietary employee Monica
10 Avery asked him about the requirement to fill out the employment forms in the new hire package. Komer explained that the forms were federally required documents and that such forms needed to be completed. Avery told him that King, who was present among the group of employees, told them not to complete the forms. Komer's written account of the incident
15 confirms that King instructed the employees not to complete the W-4, I-9, and the background check authorization. As he responded to the employees' questions, Beverly King interrupted him. He recalled that he turned to her and asked what she was doing and why she was there. Komer described King's response as belligerent and rude when she asked if he had a problem with her being present in the dayroom.

20 Komer told her that he had a problem with her being on the clock and representing herself as a union steward. She told him that she had every right to be present and moved in closer to his face. She demanded that he needed to read his union contract. He told her that he had read the contract and the contract prohibited her from conducting union business on company time. He added that she was also restricted from doing so in the residents'
25 area. Because King was becoming louder and beginning to create a scene, he walked away from her.

As he left King, Komer saw Settembrino. He asked Settembrino to determine whether King was on the clock and if so, to document the incident. Settembrino checked the
30 time records and determined that King was on the clock at the time that she met with employees in the residents' dayroom. Settembrino prepared a written warning for conducting union business on company time. The warning states that King "was sitting in and advising a Dietary meeting while on the clock for housekeeping." By the time that Settembrino completed the written warning, King had already left for the day.

35 **E. King's Testimony Concerning the Events on November 6, 2002**

King testified that she attended a meeting of Dietary employees on November 6 because she had been asked to do so by Dietary employees Margie Steel and Monica
40 Avery. King asserted that when she went into the facility's dayroom there were approximately 12 to 15 Dietary employees gathered. Some of the employees were on duty and others were not. She recalled that when she entered the room, Komer was discussing different parts of the new hire package. She told him that Union Representative Pocahontas Lyons had instructed the employees to only complete the application, W-4 form, and
45 insurance forms. Lyons wanted the other "issues" to be discussed at a meeting between Respondent and the Union in a scheduled meeting the next week. King recalled that Komer became "angry or something" and told her that she was not supposed to conduct union business on company time. King also recalled that Komer consulted with Settembrino during the time that she was in the dayroom with the employees. King recalled that the subject of the collective bargaining agreement and whether she had a right to be present came up

during her conversation with Komer.

F. The Events of November 8, 2002

5 After working on November 6, King was not scheduled to work again until November
9. Settembrino had a practice of conducting non-mandatory meetings with employees at
10:00 a.m. each payday. When Settembrino conducted the scheduled meeting on Friday,
November 8, she discussed the subject of where Housekeeping Department employees
were to leave their cleaning carts during breaks and lunches. Employees are required to
10 sign an acknowledgement of receipt when they pick up their checks. Prior to the meeting,
Settembrino noted on the list the employees who had not turned in their authorization for
withholding of union dues. Settembrino explained to employees that if there was a dot by
their name, their authorization had not been received. Settembrino recalled that King joined
the meeting around 10:30 a.m. and while Settembrino was telling employees that not all of
15 the authorization cards for dues deductions had been submitted. Settembrino recalled that
King loudly asserted: "You have all the Union cards that you are going to get. We gave
them all to you. There are no more. And if you say there are any more you're a liar." King
walked closer to Settembrino and continued to assert that every card was signed and
announced: "No one is signing anything else and giving it to you." Settembrino recalled that
20 she backed away from King and told everyone that the meeting was over and they needed to
sign for their checks.

Prior to the meeting, Settembrino placed an "x" next to King's name on the list. When
King demanded to know why there was an "x" next to her name, Settembrino explained that
25 it was because she needed to speak with King. Settembrino explained that she would not do
so that day because it was King's day off and she would speak with King when she returned
to work the next day. Settembrino recalled that King became very angry and again walked
toward her. She demanded to have her paycheck on Thursday rather than on Friday
because the check was dated for Thursday. King asserted: "I don't want you to touch my
30 check for another day more than you have to." Settembrino explained to King that
employees do not receive the checks on the day they are dated in order to confirm that there
are no errors prior to issuance of the checks. If an error had occurred, the checks could be
corrected before issuance on Friday. Settembrino described King's response as angry.
Respondent submitted into evidence a warning that Settembrino prepared on November 8
35 concerning King's insubordination at the meeting. In the plan of correction portion of the
warning, Settembrino states that she spoke with Union President Long concerning the
incident and that Long asked for the opportunity to speak with King before Settembrino made
a formal complaint. Settembrino acknowledged that she never gave the warning to King.
Long blanketly denied that Settembrino ever reported any problems to her concerning King.
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G. King's Testimony Concerning the November 8 Meeting

King also recalled that she arrived at the meeting at approximately 10:30 a.m. She
testified that she stood just inside the door and approximately 12 feet away from
45 Settembrino. King asserts that when she arrived at the meeting as it was concluding and
Settembrino asked for questions. King confirmed that she raised the issue of why
employees were paid on Friday when the checks were dated for Thursday. She also
admitted that she did not accept Settembrino's explanation and insisted upon contacting the
corporate office. King asserted that she left the room and spoke with other employees in the
hallway. King testified that employee Annie Gray told her that union dues and credit union

deductions were not being withheld from employees' paychecks. King recalled that she stuck her head back in the door and asked Settembrino about Respondent's failure to withhold union dues for some of the employees. Settembrino explained that she had brought this up during the meeting and told employees that she did not have all of the dues authorization cards. King testified that while she told Settembrino that all the authorization cards had been submitted, she had not threatened or screamed at Settembrino and she had remained 12 feet away from her.

H. Other Testimony Concerning the November 8 Meeting

Union Steward Jean Green attended Settembrino's meeting on November 8. She recalled that King questioned Settembrino as to why employees were not paid on Thursdays. She confirmed that King was not satisfied with Settembrino's response and she asked for the address and telephone number for the corporate office. Green acknowledged that while no one yelled or screamed during the meeting, she did not recall any of the other issues discussed in the meeting. She did not recall any discussions concerning the authorization cards for union dues deductions. Green described King's demeanor as "just regular" and calm. No other employees other than Gray and Green testified with respect to the November 8 payroll meeting. Gray's testimony concerning the meeting is discussed more fully in a later section of this decision.

I. Settembrino's Meeting with King on November 9

There is no dispute that Settembrino met with King on November 9 in Settembrino's office and informed her of the warning concerning her behavior on November 6. Green was present as King's union representative. Green testified that after reading the warning, she told Settembrino that "doing union business on company time" meant soliciting or trying to get people to sign union cards while on working hours. She recalled that she also told Settembrino that King had always gone "to the office" when employees needed her. After Green requested a copy of the warning, Settembrino, King, and Green took the elevator to the first floor in order that Settembrino could make a copy of the warning.

In her written account documenting the incident on November 9, Settembrino confirmed that during the meeting, Green asserted that King was only doing her job as a union steward on November 6. When King became loud and belligerent, Settembrino told her that there was no need to talk to her in that manner. King responded that she would talk to Settembrino in whatever way she wanted. King refused to sign the warning and told Settembrino that she had an "attitude" and such attitude had been present since the day Settembrino arrived at the facility. King also added that Settembrino was just mad because King didn't have to work and Respondent had to pay her.³ When King further asserted that she was not going to do any sweeping or mopping, Settembrino responded that she had not asked King to sweep and mop. Settembrino's account notes that when she asked King if she wanted a copy of the warning, King responded: "I don't care what you do because you're gonna see what's gonna happen to you." When Settembrino asked King if she were threatening her, King simply responded: "You're gonna see what's gonna happen." Settembrino includes in the documentation of the incident that Green told King: "that's enough."

³ There is no dispute that King was on light duty at that time.

As Green, King, and Settembrino were waiting for the elevator, Green told Settembrino: "Lisa, if we had to clock out every time an employee needed us we wouldn't make any money." Settembrino documented that she told Green "nothing gives anyone the right to talk to me like a dog." King responded: "I will talk to you anyway I want. God gave me this tongue, not you, and you cannot tell me how to talk." As Settembrino got off the elevator, King added that Settembrino needed "to learn how to talk to grown folks."

J. King and Green's Testimony Concerning the November 9 Meeting

In describing the discussion with Settembrino on November 9, King recalled that Green asserted that part of King's job as union steward was to go to the office with employees when needed. King recalled that she refused to sign the warning. King also asserted that as she was walking out the door of the office, Settembrino said something about King not needing to be at the facility because she was on light duty and couldn't do the work. King recalled that as Settembrino was leaving the elevator to make the copy of the warning, she told King that she would not have King belittling her in front of the other employees. King asserted that she responded that everyone was an adult and that Settembrino should talk with them as adults. King denies that she screamed at Settembrino or that she threatened Settembrino.

In direct testimony, Green denied that King threatened Settembrino or screamed at her. She recalled that Settembrino made a comment about King's belittling her in front of employees. When asked if King responded, Green acknowledged that King may have responded, however, she had not heard it. On cross-examination, Green testified that Settembrino's remark was spontaneous and not in response to any conversation that was occurring.

K. The Union's Discussion with Settembrino on November 9

When Settembrino returned from making a copy of the November 6 warning, Green was speaking by telephone with Long. Green told Settembrino that King wanted to see the original warning because she wanted to include her written comment. King included the following remarks on the warning: "Company call a meeting with Dietary I was call in meeting by Dietary Employees on 11-6-02 This is part of my Job as Shop Steward." Green also reported that Long wished to speak with Settembrino by telephone. Long asked Settembrino if she would remain at the facility to talk with her about King's warning.

When Long arrived at the facility, she met with Settembrino and Green. Settembrino recalled that Long asked Settembrino to hold up giving discipline to King and to give her (Long) a chance to talk with King about her conduct and attitude. Settembrino recalled that she assured Long that she would do so until Long had the opportunity to speak with King. Settembrino denied that she ever told the Union that she would tear up the warning that she had prepared for King.

L. Long and Green's Testimony Concerning Their November 9 Conversation with Settembrino

Long testified that when she read the warning for King, she told Settembrino that King's conduct on November 6 did not fit the restriction against conducting union business on

company time. Long told Settembrino that if employees ask King to represent them when they are “not clear about something,” they have the right to be represented under the “Weingarten Act.” Long testified that upon her explanation, Settembrino responded: “Joyce, nobody, nobody never explained this to me like you have.” Long contends that Settembrino then folded the warning and announced that she would tear up the warning. Green also recalled the Long told Settembrino that under the “*Weingarten Act*” employees had the right to union representation if they chose. Green also asserts that Settembrino acknowledged that she was unaware of such a law and that she was going to tear up the warning to King.

M. King’s Discharge

Settembrino testified that following King’s insubordination on November 8 and after her threat on November 9, she decided to terminate King. She discussed her decision with Beverly Health Administrator Steve Raines as well as her Supervisors Scott Peace and Scott Jackson. Settembrino asked Raines and Respondent’s Dietary Manager Mark Converse to act as witnesses when she met with King to notify her of the termination. On November 11, Settembrino, Converse, and Stevens met in Stevens’ office while King was paged to report to the office. King acknowledged that she stopped upon entering the office. Stevens asked her to come in and told her that he had something to discuss with her. King replied that she did not need to be there and she didn’t believe that she had any business in the office. King testified that Converse suggested that she come in and close the door for privacy. King informed the individuals in the office that she would not remain in the office without union representation. She also told them that because it was a holiday, Union Representation Pochohantas Lyons was not in her office. Settembrino told King that they would reschedule the meeting for 8:00 a.m. the following day in order for King’s union representative to be present.

Prior to the scheduled meeting on November 12, Settembrino contacted Scott Jackson and asked him to be present for the termination interview with King. Jackson and Settembrino met in Stevens’ office. When Stevens paged King to come to his office, King telephoned him and told him that she didn’t have her union representative. Settembrino and Jackson then went to King’s work area and asked King to talk with them. King refused. When Settembrino then told King that she had no choice but to terminate her, King grabbed the notice of termination from Settembrino’s hand. Settembrino and Jackson ultimately walked King to the time clock. She was instructed to pick up her belongings and to leave the facility. Settembrino recalled that as King left the building, she called out to employees that she was fired. She told employees: “We’ll see how long this one will stick.”⁴ King recalled that she told employees that she had been fired and assured them that she would be back.

III. Analysis and Conclusions

The complaint alleges that Respondent not only issued a written warning to King on November 9, 2002, but also terminated her on November 12 in violation of Section 8(a)(3) and (1) of the Act. Specifically, General Counsel alleges that Respondent disciplined King because she assisted the Union and engaged in protected concerted activities, and to discourage other employees from engaging in these activities. Because Respondent’s

⁴ Neither Counsel for the General Counsel nor Respondent presented any evidence to corroborate or to rebut any prior termination for King.

motivation is a critical element in determining the lawfulness of King's discipline, a *Wright Line*⁵ analysis must be used. In *Wright Line*, the Board set out the causation test that it would employ in all cases alleging violations of 8(a)(3). The analysis is based upon the principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002). The analysis requires that General Counsel make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." If the General Counsel makes that showing the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Mano Electric Inc.*, 321 NLRB 278, 280, fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

To meet the initial burden, General Counsel must first show the existence of activity protected by the Act. Secondly, General Counsel must prove that the employer knew that the employee had engaged in such protected activity. Thirdly, the General Counsel must demonstrate that the alleged discriminate suffered some adverse employment action. Finally, General Counsel must also establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *Ibid.* See also *Shearer's Foods, Inc.*, 340 NLRB No. 132, slip op. at fn. 4 (2003).

A. King's November 9, 2002 Written Warning

Complaint paragraphs 7, 9, and 10 allege that Respondent unlawfully issued the November 9 warning to King because she engaged in union and protected activity. Specifically, General Counsel argues that Respondent discriminatorily disciplined King because of her presence and participation as a union steward in a Dietary employees' meeting on November 6. Respondent agrees that she was disciplined for her behavior involving the gathering of employees on November 6. Respondent asserts, however, that she did not attend a meeting as a part of her duties as a union steward and that her actions were in violation of the collective bargaining agreement.

The record is undisputed that when Settembrino attempted to issue King the warning for her behavior on November 6, Union Steward Green and Union President Long contended that King was engaging in protected activity on November 6 because of "*Weingarten* rights." In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court upheld the Board's holding that Section 7 of the Act protects an employee's right to have union representation at an investigatory interview which the employee reasonably believes might eventually result in disciplinary action. "*Weingarten*" rights inhere in both "investigatory" and "disciplinary" interviews. The Board has additionally held that holding the office of union steward is protected activity under Section 7 of the Act and that activities by a steward in relation to a contractual grievance procedure are protected activity. *Limbach Company*, 337 NLRB 573 (2002). The umbrella of protection for a steward does not, however, extend to a steward's presence at all employer-conducted meetings. In *Appalachian Power Co.*, 253 NLRB 931 (1980), the Board affirmed the administrative law judge in dismissing a complaint where the union steward's right to be present was asserted by the union representative rather than the

⁵ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088, fn. 11 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

employee. The judge noted that if “the right to be present at a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or less advantageous to his interests.” Traditionally, the Board has held that *Weingarten* rights are not invoked until the request for representation is made by the employee. *Kohl’s Food Company*, 249 NLRB 75 (1980); *First National Supermarkets, Inc. d/b/a Pick-N-Pay Supermarkets, Inc.*, 247 NLRB 1136 (1980). The Board has also found that an employee’s exercise of his rights under *Weingarten* is not without limitation. See *Roadway Express, Inc.*, 246 NLRB 1127, 1129 (1979). An employee’s insistence upon representation by only one particular union steward or an insistence upon having more than one representative present has been found unprotected activity. *Barnard College*, 340 NLRB No. 106, slip op. at 3 (2003); *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977).

In order for *Weingarten* rights to apply, there must at least be an investigatory or disciplinary interview which involves at a minimum a potential confrontation between the employer and employee. More importantly, the employee must reasonably believe that discipline for the employee’s past conduct may result. In *United States Postal Service*, 252 NLRB 61 (1980), the Board did not find an employer-ordered doctor’s examination for an employee with absentee problems to fall within the parameters of *Weingarten*. The Board found that no questions of an investigatory nature were asked of the employee during the examination and there was insufficient evidence to show that the examination was intended by the employer to form the basis for issuing discipline or any other job-related action against the employee.

In the instant case, there is no allegation by the Union or Counsel for the General Counsel that any of the employees in the dayroom were there for an investigatory or disciplinary interview. There is no evidence that any of the employees even erroneously believed that they were going to meet with management for an investigatory or disciplinary interview. King asserts that she was present because employees asked her to join them for a meeting concerning their benefits. Neither King nor any of the other Dietary employees testified with respect to who allegedly conducted such meeting. King identifies Komer as the only management representative who was present in the dayroom when she spoke with employees. Komer credibly testified that he was present because employees called him into the dayroom and asked him about various forms included in the new hire employment package. The record is insufficient to demonstrate that there was an employer-mandated meeting for employees occurring at the time that King was present in the dayroom. Even if there had been an employer-conducted meeting with employees about the new hire package, there was nothing that would have triggered the right to union representation under *Weingarten*. I would also note that there is no allegation by the Union or General Counsel that Respondent was meeting with employees on November 6 in order to bypass the Union or to deal directly with employees in violation of Section 8(a)(5).

King testified that the provision in Article 15 of the contract prohibiting union activity on company time pertained only to soliciting employees to join the Union or “trying to hold a little Union meeting on the job.” King also asserted that in the past if Beverly Health planned to change a working condition or policy, Beverly Healthcare called her in as a union representative. When she was called in for such meetings, she was not required to clock out before attending. King testified at length about her attendance as a union steward at employer-mandated meetings. She also testified that she has provided assistance to employees with limited reading skills in such meetings.

King testified that on a day between September 13 and September 16, Respondent held a meeting with Housekeeping Department employees concerning the completion of their "benefit packages." King testified that she attended the meeting because the employees asked her to go with them to "make sure what was in the package." She recalled that supervisors Scott Peace, Scott Jackson, and Lisa Settembrino were present. King asserted that during the meeting she confronted Respondent's benefits representative concerning the documents relating to insurance coverage and processing paychecks. King maintained that she remained on the clock during the time that she attended the meeting. While King's testimony may have been offered to show that she had attended meetings with employees while on the clock, her testimony in this regard diminishes her allegations concerning the November 6, 2002 meeting.

Inasmuch as King was a Housekeeping employee, there is no evidence that Respondent viewed King's attendance at this meeting as anything more than her participation as a Housekeeping employee. While she contends that she was vocal and confrontational, she does not allege that she informed management that she was there as a representative for the employees. Secondly, if she had, in fact, attended the September meeting in her role as union representative, she received no discipline and was allowed to remain throughout the course of the meeting. Thus, if her testimony is credited with respect to the September meeting, there is no basis for concluding that Respondent unlawfully disciplined her for protected activities as a union representative on November 6. If Respondent previously allowed her *carte blanche* participation in any employer-mandated meeting, then there is no evidence of animus for her alleged union activity on November 6.

Citing an early Board decision,⁶ Counsel for the General Counsel argues that an employer's discipline of union stewards for conducting union business on company time has been found to be unlawful. The circumstances of that case, however, involved an employer's discharge of six union stewards for allegedly soliciting employees for union membership and the discharges were accompanied by the employer's extensive interrogation, threats, warnings, and the seizure of union cards. The Board noted that whether or not the stewards actually engaged in union solicitation during working time, the employer's rationale was merely a pretext to conceal the employer's discriminatory motive for the discipline. Counsel for the General Counsel also cites *Pepsi America*, 339 NLRB No. 125, slip op. at 10 (2003), where an employer unlawfully disciplined a steward for engaging in union activity. The steward in question, however, was attempting to file a grievance and was disciplined for being out of the production area. In finding a violation, the administrative law judge not only found that the employer harbored animus against the union but also found that the discipline was motivated in part by the employer's desire to frustrate union activities at the facility.

In summary, there is no evidence that King was unlawfully disciplined for her actions on November 6. Her presence in the dayroom was not protected activity as there is no evidence that she was engaged in the processing of a grievance or any other contractually related procedure. Additionally, there is no evidence of an investigatory or disciplinary interview that would have necessitated King's presence under *Weingarten*.

Counsel for the General Counsel maintains that when Respondent assumed the

⁶ *United Aircraft Corp.*, 179 NLRB 935-937 (1969).

supervision of Beverly Health's Housekeeping Department and Dietary Department employees, all policies and past practices remained in place. Counsel for the General Counsel relies upon the testimony of Union President Long in asserting that Beverly Health has traditionally requested union representatives to attend informational meetings with employees. Respondent does not dispute that union representatives may have traditionally been included in Beverly Health's informational meetings with employees. Beverly Health Administrator Steven Raines testified that when he held meetings with employees and asked shop stewards to attend, he did not require the shop stewards to clock out before attending the meeting. If a shop steward attended a non-management employee gathering, however, he expected the steward to clock out before attending.

It is undisputed that no one in management asked King to be present in the dayroom on November 6 for an informational meeting or for any other meeting. The credible record evidence does not demonstrate that there was a management meeting of any kind occurring at the time that King was present in the dayroom. While King testified that other employees asked her to be present for an alleged meeting, there was no testimony by the requesting employees or any other employees confirming their participation in an employer-held meeting. I note also, that at the time of the alleged meeting, Darlene Jones was the designated shop steward for the Dietary Department employees. Had there been an employer-conducted management meeting on November 6, there is no established basis for King's inclusion in the meeting rather than the designated union steward for the Dietary employees.

The overall evidence reflects that King talked with employees in the dayroom while on the clock and without prior permission or authorization by any management official. Her status as union steward did not give her authority or unrestricted discretion to conduct meetings or participate in meetings with employees during her working time simply because she determined a need to do so. Accordingly, I do not find that King was engaged in protected activity when she chose to meet with employees while on the clock on November 6, 2002. Because King was not involved in protected activity, the first prong of the *Wright Line* analysis has not been met. Accordingly, I do not find that Respondent violated Sections 8(a)(3) and (1) by issuing a warning to King for her behavior on November 6.

B. Whether King Was Unlawfully Discharged

Respondent asserts that King was discharged because she was insubordinate and because she threatened Settembrino. With respect to the *Wright Line* analysis, Counsel for the General Counsel submits that King was engaged in union activities and concerted protected activities on November 9 inasmuch as she and Green were brought into the supervisor's office to discuss King's write-up. Counsel for the General Counsel further asserts that Settembrino knew that King was an active union member and officer because she previously filed grievances against Settembrino. Finally, Counsel for the General Counsel maintains that Respondent's animus is established through the testimony of Valerie Dalton.

In March 2003, Valerie Dalton worked as a laundry assistant. When asked what she recalled about an unspecified date in March, she testified: "Okay, that morning I recall Lisa Settembrino and Mark Converse stepping off the elevator in the basement, and Lisa made the comment, said that, she get even with people that file grievances." Dalton did not identify whether there was anyone else on the elevator or even within audible range of Settembrino

at the time of the alleged comment. She did not identify what, if anything was said by either Settembrino or Converse before or after the alleged statement. Counsel for the General Counsel places a great deal of emphasis upon Dalton's testimony as Respondent's counsel did not address this alleged 2003 comment with Settembrino or any other witness. While
 5 Respondent may have discounted this threat as it was alleged to have occurred four months after King's discharge, it nevertheless remains un rebutted. Despite the fact that this testimony is un rebutted, the record is insufficient to credit the testimony. Dalton's brief testimony provides at best a post-incident threat with no context. The Board has long held that a trier of fact need not accept uncontradicted testimony as true if it contains
 10 improbabilities or if there are reasonable grounds for concluding that it is false. *General Teamsters Local 959*, 248 NLRB 693, 698 (1980); *Operative Plasterers' and Cement Masons' International Association, Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147 (1973). Without more specificity or foundation, I do not credit Dalton's testimony. Even if credited, however, such comment made four months after King's discharge does not
 15 demonstrate direct evidence of animus toward King. While there is no dispute that King filed grievances prior to her discharge, there is no record evidence of Settembrino or any other management official threatening King or any other employee prior to King's discharge. The record is silent with respect to who may have filed grievances during the four month period after King's discharge and whether any adverse actions were taken toward those individuals.
 20 Even if Dalton's testimony were sufficiently detailed to be credited, Settembrino's alleged comment provides only speculation as to what motivated her actions four months earlier.

Relying upon Beverly Health's Human Resources Management Policy and Procedures Manual, General Counsel argues that Respondent's failure to follow a
 25 progressive discipline procedure in King's discharge is dispositive of an unlawful motive. The manual, having an effective date of May 1, 1998, provides that employees below the Executive Director level with ten or more years of service will not be terminated without the approval of Beverly Health's Group Vice President. Counsel for the General Counsel argues that because King had more than ten years of employment, Beverly Health's Administrator
 30 Raines had to first approve her termination.

Contrastly, Respondent submits that there is nothing in the record to indicate that Respondent agreed to be bound by any policies and procedures of Beverly Health and that Respondent had its own rules and regulations. Respondent's rules and regulations were a
 35 part of the materials in the new hire package given to the Pleasant Grove employees for whom Respondent assumed responsibility in 2002. Item number 20 in the rules provides that insubordination to a supervisor is cause for dismissal. While the regulations provide that employee warning notices will be used to keep the employee informed of unsatisfactory work performance, there is no provision specifying a progressive discipline schedule for
 40 employees or the identity of Respondent's management officials who are designated to administer discipline. While Respondent ultimately agreed to be bound by all terms and conditions of the collective bargaining agreement between the Union and Beverly Health, the memorandum of agreement was not signed until December 3, 2002. The management rights provision of the collective bargaining agreement provides that the employer has the
 45 sole and exclusive right to discharge or discipline employees. Article 13 of the agreement also gives the employer the right to discharge an employee for just cause and that employees will be disciplined in accordance with standard Regional policy. Settembrino also credibly testified that prior to terminating King, she consulted with Beverly Health Administrator Raines as well her superiors Scott Peace and Scott Jackson. Accordingly, the record does not demonstrate unlawful motive by Respondent's failure to follow a mandated

progressive discipline schedule.

Settembrino testified that following King's conduct in the November 8 payroll meeting, she prepared an employee warning notice for King. After preparing the warning, she spoke with her boss, Scott Peace. When she initially prepared the warning, she described King's behavior in the November 8 meeting as belligerent and nasty. When Peace reviewed the warning, he instructed her to remove the words "belligerent and nasty," explaining that such terms were not professional. He instructed her to only use the term insubordinate. Pursuant to his direction, Settembrino "whited-out" the offending words⁷ and included only insubordinate. Settembrino testified that it had been her intention to give the warning to King; however, she was never able to do so. Counsel for the General Counsel argues that because Respondent never gave King a copy of the November 8 warning, Settembrino merely "cobbled together" the November 8 warning in a "failed effort to perfect King's unlawful discharge."

The November 8 warning also included a section providing for the plan of correction. In that section, Settembrino indicated that when she told Union President Long that she wanted to "file a complaint" because of King's behavior, Long urged her not to do so and to allow Long the opportunity to speak with King. Settembrino also documented that she cautioned Long that if there were additional occurrences, she would have no choice but to terminate King. Settembrino then indicated that Long advised that she would get back with Settembrino. Long blanketly denied that Settembrino ever discussed any problems with her concerning King's behavior. Based upon the overall evidence, I do not find the November 8 warning as evidence of Settembrino's unlawful motivation to discharge King. Settembrino's handling of the November 8 warning does support a finding that Respondent pieced together occurrences to justify King's discharge because of her union activities. First of all, had Settembrino prepared the warning simply to bolster her basis for the November 9 termination notice, she would, no doubt, have done a better job of creating the document. Admittedly, she prepared the first notice describing King as "nasty and belligerent." As she explained at hearing, the wording came from her heart and out of her mouth to the paper. Peace, however, directed her to remove this language and correct the warning to be more professional. If this warning had been created by Respondent only to supplement documentation in support of King's discharge, it would more likely have initially been created complete and appropriate on its face. Settembrino's admission that her first draft of the November 8th warning was based upon emotion rather than upon corporate political correctness, lends credibility to her overall testimony. While the original language may have been inappropriate, such emotionally-charged language indicates spontaneity and enforces her assertion that she prepared it on November 8 after the incident.

C. Whether General Counsel has Satisfied the Requisite Burden under *Wright Line*

Based upon the entire record evidence, I find that Counsel for the General Counsel has presented evidence that would meet the minimal burden under a *Wright Line* analysis. While I do not find that King was engaged in protected activity on November 6, 2002, she was, nevertheless, prominent and active in the Union. The total record evidence reflects that King was very visible in her role as union steward and Chairperson of the Grievance Committee. Even if only a portion of her testimony is credited, one must conclude that she

⁷ The warning reflects the modification to omit the words "belligerent" and "nasty."

was quite vociferous in her role as a representative. Thus, there is no question that in her overall employment, she was actively involved in union and protected activities that were well known to Respondent. As discussed earlier in this decision, I do not credit the testimony with respect to the statement allegedly made by Settembrino four months after King's discharge. Additionally, there is no allegation of any other statements alleged to be violative of the Act attributable to Settembrino or any other management official prior to King's discharge or related to King. While I find no evidence of any specific statements of animus, King's outspoken and occasional confrontational behavior and her activities in support of the Union are so intricately entwined that they are not easily distinguishable. Such blending of activity arguably provides the necessary nexus between her protected activity and her discharge. Accordingly, the record supports a finding that General Counsel has met its burden under *Wright Line*.

D. Whether Respondent has Satisfied the Requisite Burden under *Wright Line*

Once General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision, the burden shifts to the employer. With respect to this burden, the Board has said that it is not enough to show that it had a legitimate reason for imposing discipline against an employee. The employer must demonstrate that it would have taken the same action even without the protected activity. *Hicks Oil and Hicksgas*, 293 NLRB 84, 85 (1989). Based upon the overall record evidence, I find that Respondent has demonstrated that it would have terminated King in the absence of any protected activity.

Counsel for the General Counsel submits that while Beverly Health's Policy and Procedures Manual includes "insubordination" as a terminable offense, Respondent tendered no evidence to show that King refused to complete an assigned or directed task. I note, however, that the manual also lists "refusal to perform assigned duties after a direct order to do so" as a separate terminable offense. Respondent argues that contrary to General Counsel's interpretation, "insubordination" is a broader term⁸ than merely refusing to do an assigned task. Settembrino also acknowledged that King's insubordination did not involve her refusal to perform an assigned task or to obey a direct order. She testified that King's insubordination involved her disruptive behavior on November 8 and her threatening behavior on November 8 and 9.

In light of the credible record evidence, I do not find it suspect that Settembrino characterized King's behavior as insubordinate even though there is no evidence that she refused to perform an assigned task. An employee's abusive language to a supervisor has been found to demonstrate an insubordinate and disrespectful attitude worthy of termination. *PBS Coals, Inc.*, 302 NLRB 60, 61 (1991). Crediting Settembrino, I find that King's statements to Settembrino were equally as egregious as simply failing to perform an assigned task.

Counsel for the General Counsel asserts that Respondent and Settembrino manufactured evidence to perfect King's unlawful termination. In making this argument,

⁸ Respondent cites *Media General Operations, Inc. v. NLRB*, 394 F.2d 207 (4th Cir. 2005) where the Court found that an employee's crude and socially unacceptable behavior placed him outside the protection of the Act.

Counsel relies upon two copies of King's termination notice. One copy of the termination notice was offered by Respondent during the course of the hearing and was received as Respondent's Exhibit No. 12. Another copy of the termination notice was offered by Counsel for the General Counsel during the hearing and received into evidence as General Counsel's Exhibit No. 16. General Counsel Exhibit No. 16 includes the Employee Warning Notice documenting King's termination with an attachment describing King's conduct on November 12 after she was informed of her termination. Respondent's Exhibit No. 12 is also a copy of the Employee Warning Notice documenting King's termination. Attached is not only the same description of King's conduct on November 12, but also a description of the events on November 9.

Identical language is included in the top two-thirds of both forms. Both forms include duplicate language for describing the violation and identifying the nature of the violation. Settembrino testified that after she gave a copy of the discipline form to King, she made notes concerning the incidents on November 11 and 12 and included these on the bottom of the termination notice. She testified that the copy that she gave to King had no attachments and no additional notations at the bottom of the page. General Counsel Exhibit No. 16 contains the following handwritten notes at the bottom of the page:

11/11/02 Requested to meet with Beverly. She Refused to meet until she had Union representation. We Rescheduled to 11/12/02 at 8 00 AM and instructed her to her Responsibility to Bring her Union Representative.

11/12/02 – Assembled meeting Beverly Refused to attend as she did not have Union Representation.

Respondent Exhibit No. 12 includes the following handwritten notes in what appears to be different handwriting:

11/11/02 requested a meeting with Beverly, She Refused to meet until she had Union representation. We Rescheduled For 11/12/02 at 8:00 AM and instructed Beverly that it would be her Responsibility to get her Union Rep. She agreed.

11/12/02 8: AM – Assembled meeting – Beverly Refused to attend and said it was because she did not have her Union Representation. I went to Beverly and asked her to meet with myself and Scott Jackson, Regional MGR HCSG. Beverly said "I ain't meeting with no one." I told Beverly I had no choice but to terminate

The first line on the second page that is attached to both General Counsel Exhibit No. 16 and Respondent Exhibit No. 12 begins with the wording: "her for insubordination." The remainder of the second page attached to both documents contains the exact wording and appears to be written in the same handwriting.

King testified that she first saw General Counsel Exhibit No. 16 when Settembrino gave it to her. She recalled that there was only the Employee Warning Notice without any attachments and she gave her copy of the form to the Union. King testified that she first saw Respondent Exhibit No. 12 in the second step grievance meeting. She asserted that Respondent Exhibit No. 12 was not the form given to her on the date of her discharge.

Union representative Pochohantas Lyons testified that she first saw Respondent Exhibit No. 12 and the one page attachment during her grievance investigation of King's termination. Settembrino testified, however, that she had never seen the document identified as General Counsel No. 16 prior to the time that it was shown to her during the earlier arbitration of King's termination.

Counsel for the General Counsel maintains that the discernible differences in the handwriting and the difference in wording on the two forms demonstrate that Respondent manufactured evidence. While Respondent's counsel acknowledges that there is some confusion with the two documents, he points out that the language is similar.

Despite witness testimony, the record is not only contradictory, but also significantly limited with respect to General Counsel Exhibit No. 16 and Respondent Exhibit No. 12. Settembrino testified that the copy of the termination notice given to King on November 12 did not contain any attachments or any handwritten notes at the bottom of the page inasmuch as she later added the notes at the bottom of the page to document what occurred on November 11 and 12. King testified that the copy that she received on November 12 contained handwritten notes on the bottom of the page and no attachments. King asserts that she gave her copy of the termination notice to the Union and that she first saw Respondent's Exhibit No. 12 at the second step grievance meeting concerning her termination. Settembrino testified that she never saw General Counsel Exhibit No. 16 until the arbitration of King's discharge. While she testified that her handwritten notes appeared at the bottom of Respondent Exhibit No. 12, she could not identify the handwriting that appeared at the bottom of the termination notice identified as General Counsel Exhibit No. 16.

The divergence of testimony concerning these two documents is consistent with the contradictory evidence concerning all other aspects of this case. After having reviewed the documents and after consideration of the entire record testimony, I find that the distinction in these two documents enhances the credibility of Settembrino. While the notes at the bottom of both documents contain slightly different wording and appear to be authored by different individuals, they concern events occurring after the decision to discharge King. There is no dispute that the events described on November 11 and 12 are not asserted to be the basis for King's discharge. In his brief, Counsel for the General Counsel points out that the wording in Respondent Exhibit No. 12 portrays King as insubordinate by including her statement: "I ain't meeting with no one." By contrast, the wording at the bottom of General Counsel Exhibit No. 16 presents King as being more cooperative and simply asserting her request to delay the disciplinary meeting until her union representative could attend. While the record is not clear as to how the attachment was added to General Counsel Exhibit No. 16, I note that the first line of the attachment appears to finish the last sentence that appears on Respondent No. 12. Accordingly, the two documents support the testimony of Settembrino rather than King. Contrary to the assertion that Respondent manufactured Respondent Exhibit No. 12, the evidence reflects that the wording on the bottom of General Counsel Exhibit No. 16 does not even correlate to its attachment. In his argument that Respondent manufactured both exhibits, Counsel for the General Counsel maintains in his brief that General Counsel Exhibit No. 16 was given to Lyons pursuant to the Union's information request and that Respondent Exhibit No. 12 may have been fabricated for the unfair labor practice hearing. Lyons testified however, that Respondent Exhibit No. 12 was given to her when she requested information from Respondent in the course of her grievance investigation. Thus, while both King and Lyons identified the Respondent Exhibit No. 12 as

the document provided to the Union during the grievance processing, the record is not clear as to how General Counsel Exhibit No. 16 came into existence. While King identified General Counsel Exhibit No. 16 as the termination notice that she received on November 12, she also testified that there was no attachment to the form. When introduced at trial, General Counsel Exhibit No. 16 had an attachment that appeared to complete the last handwritten sentence on Respondent Exhibit No. 12. Settembrino credibly testified that she never saw General Counsel Exhibit No. 16 prior to the arbitration proceeding. The above-described discrepancies only serve to enhance the credibility of Settembrino and further discredit King.

Ultimately this case involves the assessment of credibility for Lisa Settembrino and Beverly King. After observing both their demeanor and based upon the total record evidence, I find Settembrino far more credible than King. Respondent asserts that Settembrino made the decision to terminate King and that the decision was based upon King's conduct toward Settembrino on November 8 and November 9. While Settembrino does not assert that King's previous conduct was a factor in the decision to terminate King, such conduct provides a background for evaluating King's conduct and Settembrino's reaction to such conduct. Settembrino alleges that following King's threat to her on September 24, there were several incidents when someone tampered with her vehicle. Steven Raines who is no longer employed by Beverly Healthcare and who was never employed by Respondent corroborated Settembrino's testimony. He recalled that Settembrino reported the threat to him as well as the damage to her vehicle. Settembrino recalled that Raines responded by pointing out that it was her word against King and that there was no way to prove the threat. He simply suggested that she park in a different area and he arranged for the maintenance supervisor to accompany her to her car for a period of time. Counsel for the General Counsel argues that it is significant that Settembrino did not report the threat to the police at the time.⁹ It is apparent, however, that Raines did little to encourage her to do so. Counsel for the General Counsel also argues that Settembrino did not include this prior threat in the affidavit given to the Board Agent during the Region's investigation. There is, however, no evidence that the Board Agent inquired as to any previous threats. The affidavit reflects that Settembrino told the Board Agent that King had been loud and rude and had threatened her. Inasmuch as Settembrino did not base King's discharge on the prior threat, I don't find it significant that Settembrino failed to elaborate on the prior threat. I do, however, find Settembrino's testimony concerning this threat to be extremely credible. Her initial reference to this prior threat occurred during cross examination by Counsel for the General Counsel and not as a part of her direct examination by Respondent. During his own examination of Settembrino, Respondent's counsel initially

⁹ Counsel for the General Counsel also asserts that a 1998 Beverly Health policy and procedures manual section sets out a procedure for handling a complaint involving a threat of violence. The procedure, however, provides for the sequence of notification for Beverly Health management and Human Resource officials and provides for an investigation pursuant to Beverly Health's Safety and Loss Control Manual. While Counsel for the General Counsel maintains that the manual section provides for the notification of the appropriate law enforcement authorities, I note that the language provides for notification "if others appear to be in danger." I do not find this manual section significant in assessing Settembrino's response to King's September threat. There is no evidence that Respondent adopted all of Beverly Health's policies and procedures when it assumed the supervision of the Pleasant Grove Housekeeping and Dietary Departments. Additionally, the specific language in issue required notification of the appropriate law enforcement authorities only when "others appear to be in danger." By contrast, King's alleged threat was directed only to Settembrino.

declined to pursue any follow-up inquiry concerning the earlier threats after Settembrino demonstrated obvious emotional distress when asked to describe the occurrence. It was only after Counsel was advised that this was an area where there would likely be additional inquiry by either Counsel for the General Counsel or the administrative law judge that Counsel for Respondent elected to inquire further about these threats with his own witness.

Overall, I found Settembrino's testimony to be straightforward and credible. I also note that at the time of her testimony, she was no longer an employee or Respondent, having resigned in November 2004. She had no apparent vested interest in the outcome of the proceeding. Her testimony was consistent without apparent fabrication or exaggeration. In describing King's alleged threat in September 2002, Settembrino became visibly shaken, demonstrating a great deal of emotion when asked to recount the details. Her credibility in describing the September threat is enhanced by her candid admission that she had less recall of the King's additional threat in October. If the threats alleged to have occurred prior to November were simply fictitious and created only to bolster Respondent's defense for King's discharge, Settembrino would, no doubt, have been able to recite both alleged threats with clarity and detail.

During cross-examination, Counsel for the General Counsel asked Settembrino for her personal journal for documentation of King's September 2002 threat. Counsel for the General Counsel argues in his brief that even though she knew that she was testifying, she failed to bring her diary or journal with her. Counsel for the General Counsel further argues that an adverse inference should be drawn from Respondent's failure to "tender probative evidence within its control." The record does not reflect however, that General Counsel subpoenaed these documents from either Respondent or Settembrino. As Counsel for the General Counsel correctly points out, an adverse inference may be drawn when a party fails to produce relevant evidence within its control.¹⁰ In the instant case, however, there was no evidence that Settembrino had ever provided Respondent a copy of her personal journal or even access to her personal diary or journal. Because her testimony concerning the existence of her journal came out on cross-examination, there was no evidence that Respondent had knowledge of such personal journal notes prior to the trial.

In contrast to Settembrino, I found King less credible. Her testimony was essentially consistent; however, it appeared as contrived and disingenuous. She described herself as having been a very active and outspoken Union officer for a substantial number of years. She contends, however, that when presented with the warning on November 9, she simply refused to sign the warning without comment. She asserts that Green and Settembrino discussed the warning and Settembrino's basis for the warning. The only comment that King's acknowledges making on November 9 was a comment after the meeting and as Settembrino was exiting the elevator to make a copy for Green. King alleges that she told Settembrino "everybody was an adult and she should talk to them like adults."

Union Steward Green and employee Annie Gray were presented as corroboration for King. Gray testified that when she attended the November 8 meeting, she observed no screaming or threats. She described both Settembrino and King's behavior as "normal." She testified that during the course of the meeting, King inquired about why the employees were not receiving their checks on the day that the checks were dated. She also

¹⁰ *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

corroborated King's testimony that after the close of the meeting, King inquired about why union dues were not being deducted from employee paychecks. While Gray corroborated King's testimony in part, her recall did not fully corroborate King's version of the events on November 8. King testified that she arrived after the meeting started and that she remained at the back of the room for the remainder of the meeting. King estimated that her distance from Settembrino was approximately 12 feet. Gray testified that she arrived at the same time as King and she estimated that she and King were approximately two to three feet away from Settembrino during the meeting. Gray testified that Respondent supervisor Mark Converse was also present at the meeting. King testified that the meeting was conducted by Settembrino. Neither Settembrino nor King identified Converse as being present at the meeting. Gray testified that Settembrino explained that it was company policy for employees to get their checks on Fridays instead of Thursday. She recalled that in response, King had merely said: "okay." In contrast to Gray, King recalled telling Settembrino:

So I questioned her as to why our pay stub was saying that our payday is on a Thursday and you're paying them on Friday. I said, I feel like this is a legal document, so you know, why you paying us on Friday when our pay stubs says Thursday. I said, I looked at all my stubs and they all reflected that our payday is Thursday. And I said, when you all came in the door, you said, you was going to abide everything by Beverly. I said now their paychecks was dated for a Friday, but out of courtesy, all those years they would give us our checks on Thursday after 2 o'clock. So I said, I believe that this is a legal document, so I just wanted to know why we are getting paid on Friday.

King also recalled that she continued by telling Settembrino that she wanted the telephone number for the corporate office in order that she could find out why the checks were dated for Thursdays. King asserted that Settembrino refused and told her that she could not provide the number. King testified that she told Settembrino that she would get the corporate number and again asserted that the check was a legal document.¹¹

Gray testified that when King asked Settembrino why dues were not being deducted from employees' checks, Settembrino responded that she did not know. Gray did not recall that King responded. When asked if King made any suggestions to Settembrino about the union dues, Gray testified that she did not know because she received her check and left. Gray did not recall any discussion between King and Settembrino during the meeting about there being a checkmark by King's name on the payroll roster or Settembrino's telling King that she needed to meet with her. King testified that as she signed for her check, she asked Settembrino why there was a "star" or an "x" by her name. Settembrino told King that she needed to see King about a matter. King recalled that while she told Settembrino: "I'm here," Settembrino told her that she would discuss the matter the following day.

Certainly Gray's testimony contradicts Settembrino in that Gray recalls no comments by King that would have been insubordinate or even argumentative. As discussed above, Gray's recall also contradicts King in a number of respects. She maintains that while she left the meeting at the same time as King, she does not maintain that King left the facility at the same time that she left. Inasmuch as she acknowledged that she "picked up her check and

¹¹ Green testified that she heard King tell Settembrino that she would call the corporate office about their checks. She did not recall any other topics or issues discussed during the meeting.

left," she cannot account for the entire conversation between King and Settembrino.

Jean Green, who has served with King as a shop steward and on the grievance committee for 15 years, denied hearing any threats on November 9. Green also acknowledged that she and King were friends. When asked to describe the meeting with King and Settembrino on November 9, Green provided an account involving virtually no participation by King. According to Green's account, King simply declined to sign the warning when asked by Settembrino. Based upon Green's account, only Green and Settembrino discussed King's warning while the three of them met in Settembrino's office. Green testified that just before Settembrino left them to make a copy of the warning, Settembrino "told Beverly she wasn't going to have her belittling her employees in front of her anymore." Green concedes that King may have responded to Settembrino, however, she had not heard it.

In assessing credibility, the Ninth Circuit Court of Appeals has suggested that all aspects of a witness's demeanor, including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication, may convince an observing trial judge that the witness is testifying truthfully or falsely. *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977). In addition to the subjective evaluations of witness demeanor, credibility resolutions are also based upon the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711 fn. 1 (1989).

In the final analysis, I have made both demeanor and derivative credibility determinations after hearing all of the testimony and after observing the demeanor of all the witnesses. As a result of my analysis and for the reasons that I have discussed above, I credit the testimony of Settembrino with respect to King's behavior on both November 8 and 9. For the reasons stated above, I do not credit the testimony of King, Gray, Long, and Green that is contradictory to Settembrino. The total record evidence supports my finding that Respondent would have terminated King in the absence of any protected activity. Accordingly, I find that Respondent did not unlawfully terminate King on November 12 as alleged.

Conclusions of Law

1. Healthcare Services Group, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steel Workers of American AFL-CIO, CLC, Local 9021 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(3) and (1) of the Act as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹²

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations,
Continued

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.